

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

**JOHN DOE I, b/n/f PARENTS OF  
JOHN DOE I; JANE DOE I, b/n/f  
PARENTS OF JANE DOE I, et al.,  
and on behalf of other students  
similarly situated;**

**PROPOSED CLASS, PLAINTIFFS,**

**V.**

**ALLEN INDEPENDENT SCHOOL,  
MS. AMY GNADT, President;  
MS. KELLEY ROWLEY, Vice-President;  
MR. DAVID NOLL, Secretary and Board  
Members MR. KEVIN CAMERON,  
MS. SARAH MITCHEL, DR. POLLY  
MONTGOMERY and MR.  
VATSA RAMANTHAN; IN THEIR  
OFFICIAL CAPACITIES,**

**DEFENDANTS.**



**CIV. ACTION NO. 4:21-cv-00697**

# CLASS ACTION COMPLAINT FOR VIOLATIONS OF PLAINTIFFS' CONSTITUTIONAL RIGHT TO LIFE

# ORIGINAL CLASS ACTION COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiffs John Doe I and Jane Doe I by and through their parents as next friends, and on behalf of the “PROPOSED CLASS, (collectively “PLAINTIFFS” herein) in the above noted and styled Class Action Complaint alleging that the Allen Independent School District (hereinafter referred to as “the School District”) by and through its School Board Members (hereinafter collectively referred to as the School Board) in their Official Capacities, named as follows; the Honorable President, Ms. Amy Gnadt, the Honorable Vice-President, Ms. Kelley Rowley; the Honorable Secretary, Mr. David Noll; and Honorable Board Members Mr. Kevin

Cameron, Dr. Polly Montgomery, Ms. Sarah Mitchell and Mr. Vatsa Ramanathan violated the constitutional rights of DOE's and the PROPOSED CLASS MEMBERS in the manners and particulars more specifically addressed below. Plaintiffs reserve the right to replead if new claims and issues arise upon further development of the facts, as permitted by law. In support thereof Plaintiffs would respectfully show this tribunal the following:

### **I. PROLOGUE**

1. "No freedom is more precious than life itself.....

..... Texas will always defend the right to life."

#ProLife- The Honorable Governor of Texas, Gregory Abbot

This pronouncement by the Governor, is based upon public policy set forth by the Texas Legislature. The PROPOSED MEMBERS in this CLASS ACTION seeks to assure that Texas Public Policy giving due honor to the preciousness of life, is effectuated in concert by and through the *Due Process Clause* of the 14<sup>th</sup> Amendment to the United States Constitution which states:

Section 1- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or *enforce* (emphasis added) any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of *life* (emphasis added), liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. While it yet to be determined whether or not a student has a constitutional right and liberty interest in not wearing a mask at school, even if so, it does not supercede the DOE'S constitutional right to life (and by extension their health) to have those same students wear a mask at school, because of the current rampage of the COVID19 Pandemic Delta variant.  
  
The School Board has a duty to assure the *right to life* of the DOES's and all students for that matter, is effectuated in School Board Policies, Procedures and Directives but currently

it is not. In fact, it gives more import to the happiness of some students over the life, health and welfare of many others. Accordingly, the DOE's and the PROPOSED CLASS file this suit to assure their constitutional right to life and health is protected by the Board as "first chair" and not relegated to "second fiddle."

3. Approximately two hundred (200) physicians at the Cooks Children's Health Care System recently sent an *Open Letter* to "The Leadership at North Texas Regional Schools" and wrote:

We, the physicians at Cook Children's Health Care System, are directly connected to the district or school either as concerned parents or as pediatricians who care for the children we mutually share with your district/school. We are writing to you to express our concerns about the Delta Variant of COVID-19 and to recommend that our school district implement safety protocols beyond those that have been in place this summer to address this exigent threat. The rapid increases in COVID-19 cases, hospitalizations and deaths locally and throughout the US in recent weeks are alarming and require an appropriate response. Indeed, we are seeing rising COVID-19 cases in our practices.

Starting with the following they also wrote we "Strongly encourage universal masking for students and staff in accordance with CDC and American Academy of Pediatrics recommendations, and provided a 10 point safety checklist.<sup>1</sup> They underscored their advice with the following:

"The Cook Children's Promise states: "Knowing that every child's life is sacred, it is the Promise of Cook Children's to improve the health of every child through the prevention and treatment of illness, disease and injury." Please help us honor the health and sanctity of our children's lives through your sincere attention to these recommendations. We would welcome the opportunity to collaborate with the district/school in promoting the health and safety of our community during this new and troubling phase of the pandemic. We will gladly provide additional data if it would be helpful, and we are available to answer any questions that arise. We appreciate your time and l

With respect and care,

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<sup>1</sup>. <https://www.checkupnewsroom.com/cook-childrens-10-point-guide-for-safely-reopeningschools/>

Signed off by approximately two hundred(200) physicians”

## **II. INTRODUCTION**

4. It is well known that our country is in the midst of a plague. Fortunately, a vaccine is available for adults and young people, but not for children under twelve years (12) years old and by extension those children in elementary schools and middle school. In short, they are at extreme risk of getting the current strain of the virus, known as the Delta Variant. Unlike its earlier iteration it is extremely more infections and spreads more easily, affecting people who have not been vaccinated disproportionately and as a matter of course, children who can't yet receive a vaccination. The Allen Independent School District does not require its students, teachers, staff or even guests to wear a face mask putting our youngest and precious ones at significant risk. The District relies upon an Executive Order from the Governor of Texas that purportedly does not permit a local school board to have mask mandate. As more fully discussed below the Governor's order is superceded by the Supremacy Clause noted in the United States Constitution. Moreover the value of life in the due process clause of the 14<sup>th</sup> Amendment to the Constitution supercedes another constitutional right to liberty or happiness.
5. JOHN DOE I is a member of a PROPOSED CLASS are all children who can't receive vaccines, have become sick with the COVID Delta Variant and in any case reasonably believe they have been exposed to it, so they will become sick with COVID Delta Variant in the reasonably foreseeable future because of their increased risk factor. In addition and in the alternative, JOHN DOE I and members of the PROPOSED CLASS are all children who can't receive vaccines, have been exposed to the Delta Variant and have siblings who

attend another Allen Independent School District Campus Program, putting their siblings like JANE DOE I and family members at increased risk of being attacked by this deadly disease. The School Board can easily fix this problem, simply require all students, teacher, parents and visitors to follow current and ongoing guidelines as set forth by the United States Department of Health & Human Services Center For Disease Control (“CDC”) and follow other recommended safety measures. As the School District has refused to enact such a policy, or a reasonable facsimile thereof, the DOE’s and the PROPOSED CLASS bring forth this action pursuant to Federal Rules of Civil Procedure 23 and Constitutional Claims pursuant to 42 U.S.C. Section 1983 and solely seek equitable relief, all as more fully described below.

### **III. SUPREMACY CLAUSE**

6. The Governor of Texas, the Honorable Greg Abbot issued Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster which among other things, states that a public school district cannot require a student or employee or any person for that matter, as a condition of entry to a public, to wear a mask. Respectfully, while arguably well-intended, it is nevertheless rendered a nullity by the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2) which states that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the "Supreme Law of the Land" and thus take priority over any conflicting state laws. It provides that state courts are bound by, and state constitutions subordinate to, the supreme law of the land.

### **IV. JURISDICTION**

7. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C.A. §1331 and §1343 because

the matters in controversy arise under the Constitution and laws of the United States.

8. Furthermore, this Court has supplemental jurisdiction over various state and common law claims pursuant to 28 U.S.C. §1367.

#### **V. VENUE**

9. Pursuant to 28 U.S.C. §1391 this Court is the proper Venue over this cause, as all events and omissions giving rise to Plaintiffs claims occurred in the Eastern District of Texas, Sherman Division.

#### **VI. PARTIES**

10. JOHN DOE I lives with his parents in the Allen Independent School District catchment area. He is a student at the Boone Elementary School in the Allen ISD.
11. JANE DOE I is the sibling of JOHN DOE I and lives with him and their parents in the Allen Independent School District catchment area. She is a student at the Allen High School.
12. The Allen Independent School District is a school district organized under the laws of the State of Texas and at all times is required to follow the laws contemplated by the United States Constitution and the federal and state laws and rules promulgated thereunder. District personnel are thus responsible for the care, management and control of all public school business within its jurisdiction; including but not limited to the assuring the health and safety of students within the district are paramount. They may be served by and through their Superintendent, the Honorable Robin Bullock at 612 East Bethany Drive, Allen, Texas, 75002. Plaintiffs' Counsel has been in contact with the Honorable Lucas Henry and Mari McGowan, Attorneys with the Law Firm of ABERNATHY, ROEDER, BOYD & HULLETT, P.C., 1700 Redbud Blvd., Suite 300, McKinney, Texas 75070, who has agreed to accept and/or waived service for the District and all the following School Board

Defendants.

13. Ms. Amy Gnadt is the President of the Allen Independent School District Board of Directors and is sued in her Official Capacity.
14. Ms. Kelley Rowley is the Vice-President the Allen Independent School District Board of Directors and is sued in her Official Capacity.
15. Mr. David Noll is the Secretary the Allen Independent School District Board of Directors and is sued in his Official Capacity.
16. Mr. Kevin Cameron is a Board Member with the Allen Independent School District Board of Directors and is sued in his Official Capacity.
17. Dr. Polly Montgomery is a Board Member with the Allen Independent School District Board of Directors and is sued in her Official Capacity.
18. Ms. Sarah Mitchell is a Board Member with the Allen Independent School District Board of Directors and is sued in her Official Capacity.
19. Mr. Vatsa Ramanathan is a Board Member with the Allen Independent School District Board of Directors and is sued in his Official Capacity.

## **VII. STANDING**

20. JOHN DOE I, JANE DOE I and all the DOE's in this case have standing to bring this lawsuit because they and their families live in the Allen Independent School District catchment area. Moreover each individual plaintiff is too young to receive a vaccine and has gotten ill from the Delta Variant, has been exposed to Delta Variant, will in the reasonably foreseeable future get ill from Delta Variant, or be a carrier of the Delta Variant and get another person sick. Moreover, and because of the unknown aspects of this disease, all the above is capable of repetition yet evading review.

### **VIII. IMMUNITY**

21. To the extent the School District wants to claim 11<sup>th</sup> Amendment Sovereign Immunity it may not do so, as it is not eligible for such protections. Moreover, and in any case even if it were, it may not claim the protection of sovereign immunity because the DOE's and members of the PROPOSED CLASS are asking only for equitable relief. Ex Parte Young, 209 U.S. 123 (1908). As the School Board Members while named are sued in their Official Capacities and as such the affirmative defense of Qualified Immunity does not apply. If the Defendant attacks the DOE's and members of the PROPOSED CLASS attempt to deny Class Certification and it is granted, the DOE's and members of the PROPOSED CLASS reserve the right to amend this petition, seek damages and serve the Board Members in their Individual Capacities.

### **IX. RETALIATION**

22. Similar to any immunity a School Board Member may have in regard to this litigation,, DOE's and the PROPOSED CLASS, Plaintiffs herein put the Allen Independent School Board on notice that they plan to seek the safe harbour of School Board Policies and Procedures protecting the rights of those persons who file complaints, grievances and who otherwise seek to redress their concerns through First Amendment Rights under the United States Constitution. If any Defendant individually or collectively or by proxy attempts to retaliate against any DOE's or member of the PROPOSED CLASS, DOE's and members of the PROPOSED CLASS reserve the right to amend this petition, seek damages for retaliation and serve the Board Members in their Individual Capacities for such retaliation.

### **X. ADMINISTRATIVE EXHAUSTION**

23. Plaintiffs contend there are no claims in this litigation that require Administrative



Exhaustion, as otherwise required may by the *Individuals With Disabilities Education Act* (“IDEA”), 20 U.S.C. §1415(1), as it is not warranted in this cause. It is an exception to the Administrative Exhaustion requirement because it is a CLASS ACTION; and all students both disabled and not are seeking the same relief, i.e., the following of all current recommendations for School aged children from the *Center For Disease Control* (“CDC”). Specifically, including and not limited to the duty that all students, staff, visitors and third party vendors wear masks when on any Allen ISD Campus and follow other preventative health related measures. *See also* Exh. A, Letter From Cook Children's Health Care System To North Texas Regional School Administrators, incorporated herein as if fully set forth.

24. A Special Education Hearing Officer generally appointed to hear claims under the IDEA does not have the jurisdiction to address class actions. More specific to JOHN DOE, and those persons similarly situated, a Special Education Hearing Officer in Texas does not have the authority to order the Allen Independent School District to follow CDC Guidelines or order all students to wear a mask at school and provide the relief requested. Only this Court can. Accordingly, Administrative Exhaustion is futile. Honig v. Doe, 484 U.S. 305, 327; 108 S. Ct. 592 (1988).

## **XI. THE CURRENT HEALTH CRISIS**

- A. THE INITIAL CONCERNS
25. Coronavirus disease 2019 (COVID-19)<sup>2</sup> is a contagious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The first known case was identified in Wuhan, China, in December 2019. The disease has since spread worldwide, leading to an

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<sup>2</sup>. <https://en.wikipedia.org/wiki/COVID-19>

ongoing pandemic. Symptoms of COVID-19 are variable, but often include fever, cough, headache, fatigue, breathing difficulties, and loss of smell and taste. Symptoms may begin one to fourteen days after exposure to the virus. At least a third of people who are infected do not develop noticeable symptoms. Of those people who develop symptoms noticeable enough to be classed as patients, most (81%) develop mild to moderate symptoms (up to mild pneumonia), while 14% develop severe symptoms (dyspnea, hypoxia, or more than 50% lung involvement on imaging) and 5% suffer critical symptoms (respiratory failure, shock, or multiorgan dysfunction). Older people are at a higher risk of developing severe symptoms. Some people continue to experience a range of effects (“long COVID”) for months after recovery, and damage to organs has been observed. Multi-year studies are underway to further investigate the long-term effects of the disease.

26. COVID-19 transmits when people breathe in air contaminated by droplets and small airborne particles containing the virus. The risk of breathing these in is highest when people are in close proximity, but they can be inhaled over longer distances, particularly indoors. Transmission can also occur if splashed or sprayed with contaminated fluids in the eyes, nose or mouth, and, rarely, via contaminated surfaces. People remain contagious for up to 20 days, and can spread the virus even if they do not develop symptoms. Several testing methods have been developed to diagnose the disease. Preventive measures include physical or social distancing, quarantining, ventilation of indoor spaces, covering coughs and sneezes, hand washing, and keeping unwashed hands away from the face. The use of face masks or coverings has been recommended in public settings to minimize the risk of transmissions. While work is underway to develop drugs that inhibit the virus (and several vaccines for it have been approved and distributed in various countries, which have since initiated mass

vaccination campaigns), the primary treatment is symptomatic. Management involves the treatment of symptoms, supportive care, isolation, and experimental measures.

B. THE COVID-19 PANDEMIC AND CHILDREN PART I

27. A systematic review notes that children<sup>3</sup> with COVID-19 have milder effects and better prognoses than adults. However, children are susceptible to "multisystem inflammatory syndrome in children" (MIS-C), a rare but life-threatening systemic illness involving persistent fever and extreme inflammation following exposure to the SARS-CoV-2 virus. As a vulnerable population, children and youth may be affected by the COVID-19 pandemic in many other domains, including education, mental health, safety, and socioeconomic stability; the infection of the virus may lead to separation or loss of their family. As with many other crises, the COVID-19 pandemic may compound existing vulnerabilities and inequalities experienced by children. When a child is infected with COVID-19, they are more likely to have an asymptomatic case, or one that is mild to moderate in severity. They are less likely to become infected or hospitalized than adults. Nevertheless severe illness is possible, and in these instances respiratory support, such as a ventilator, may be required. Some children have experienced multiple organ failure. Such severe or critical cases were most common among children with certain underlying conditions, such as for example, asthma (and especially more severe cases of asthma) or those with weakened immune systems. Children are associated with lower mortality rates than other age groups, when infected with COVID-19. They are more likely to experience gastrointestinal symptoms than adults. The most common symptoms among children include fever symptoms,

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<sup>3</sup>. [https://en.wikipedia.org/wiki/Impact\\_of\\_the\\_COVID-19\\_pandemic\\_on\\_children](https://en.wikipedia.org/wiki/Impact_of_the_COVID-19_pandemic_on_children).

followed by a dry cough. Other commonly reported symptoms among children include nasal congestion or runniness, fatigue, and headache. Some evidence suggests that many children who become ill develop "long COVID". Early into the pandemic, dermatologists reported an increase in chilblains-like lesions in children, especially on their feet, fingers, and toes. It has been informally referred to as "COVID toes." This was presumed related to COVID-19 infection, however confirming that a child has been infected can be difficult. Some children who become infected develop a rare condition known as MIS-C, short for "multisystem inflammatory syndrome in children". This causes a persistent fever and extreme inflammation. Other symptoms associated with MIS-C include severe abdominal pain and hypotension.

#### C. THE DELTA VARIANT PART II

28. On July 27, 2021, the Center For Disease Control ("CDC")<sup>4</sup> released updated guidance on the need for urgently increasing COVID-19 vaccination coverage and a recommendation for everyone in areas of substantial or high transmission to wear a mask in public indoor places, even if they are fully vaccinated. CDC issued this new guidance due to several concerning developments and newly emerging data signals. First, a significant increase in new cases reversed what had been a steady decline since January 2021. In the days leading up to our guidance update, CDC saw a rapid and alarming rise in the COVID-19 case and hospitalization rates around the country. In late June, the 7-day moving average of reported cases was around 12,000. On July 27, the 7-day moving average of cases reached over 60,000. This case rate looked more like the rate of cases we had seen before the vaccine was

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<sup>4</sup>. <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>

widely available. Second, new data began to emerge that the Delta variant was more infectious and was leading to increased transmissibility when compared with other variants, even in some vaccinated individuals. This includes recently published data from CDC and our public health partners, unpublished surveillance data that will be publicly available in the coming weeks, information included in CDC's updated Science Brief on COVID-19 Vaccines and Vaccination, and ongoing outbreak investigations linked to the Delta variant. Delta is currently the predominant variant of the virus in the United States. Below is a high-level summary of what CDC scientists have recently learned about the Delta variant. More information will be made available when more data are published or released in other formats.

D. THE DELTA VARIANT AND CHILDREN<sup>5</sup>

29. The highly contagious delta variant has transformed the COVID-19 pandemic, and is accounting for the overwhelming majority of new cases across the U.S. And new cases in children are up 85% in recent weeks, prompting groups like the American Academy of Pediatrics and the Centers for Disease Control and Prevention to send a clear message: Delta is different. Hospitals in COVID-19 hotspots around the U.S. note they're running out of beds for pediatric patients. That uptick in hospitalizations seems to reflect the fact that delta is more contagious, and that children are more vulnerable because they're not yet eligible for vaccination.<sup>6</sup>

30. Schools are an important part of the infrastructure of communities. They provide safe and

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<sup>5</sup>. <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html#print>

<sup>6</sup>. [https://www.huffpost.com/entry/delta-variant-symptoms-kids\\_1\\_6116b48fe4b07c140314b7c8](https://www.huffpost.com/entry/delta-variant-symptoms-kids_1_6116b48fe4b07c140314b7c8)

supportive learning environments for students that support social and emotional development, provide access to critical services, and improve life outcomes. They also employ people, and enable parents, guardians, and caregivers to work. Though COVID-19 outbreaks have occurred in school settings, multiple studies have shown that transmission rates within school settings, when multiple prevention strategies are in place, are typically lower than – or similar to – community transmission levels. CDC’s science brief on Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs summarizes evidence on COVID-19 among children and adolescents and what is known about preventing transmission in schools and Early Care and Education programs.

31. However, with COVID-19 cases increasing nationally since mid-June 2021, driven by the B.1.617.2 (Delta) variant of SARS-CoV-2, protection against exposure remains essential in school settings. Because of the highly transmissible nature of this variant, along with the extent of mixing of vaccinated and unvaccinated people in schools, the fact that children less than 12 years of age are not currently eligible for vaccination, and low levels of vaccination among youth ages 12-17, CDC recommends universal indoor masking for all students (age 2 years and older), teachers, staff, and visitors to K-12 schools regardless of vaccination status. Schools should work with local public health officials, consistent with applicable laws and regulations, including those related to privacy, to determine the additional prevention strategies needed in their area by monitoring levels of community transmission (i.e., low, moderate, substantial, or high) and local vaccine coverage, and use of screening testing to detect cases in K-12 schools. For example, with a low teacher, staff, or student vaccination rate, and without a screening testing program, schools might decide that they need to continue to maximize physical distancing or implement screening testing

in addition to mask wearing. Schools should communicate their strategies and any changes in plans to teachers, staff, and families, and directly to older students, using accessible materials and communication channels, in a language and at a literacy level that teachers, staff, students, and families understand.

E. COVID 19 AND THE DELTA VARIANT IN TEXAS

32. The highly contagious delta variant is causing a rapid surge in new COVID-19 cases, hospitalizations and deaths in Texas. Jennifer Shuford, chief state epidemiologist at the Texas Department of State Health Services, said preliminary data show the delta variant currently makes up more than 75% of new COVID cases in the state. “What Texas is experiencing is similar to what’s happening across the United States,” she said. Much like other states where the delta variant is surging, there has been an uptick in severe illness due to COVID here. Chris Van Deusen, a spokesman for the agency, said that compared to just last week, new COVID cases are up 92% in Texas, hospitalizations are up 49% and fatalities are 15% higher. “Those are all going in the wrong direction,” he said. Shuford said COVID-19 has been rapidly spreading particularly among unvaccinated people. Because older populations have higher vaccination rates than younger people, she said the latter are seeing the highest spikes in infections right now. “We do expect that more of these cases are going to be seen in younger individuals just because they don’t have that protection from being fully vaccinated,” Shuford said.<sup>7</sup>

33. Governor Abbott’s order was issued only days before the Centers for Disease Control

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<sup>7</sup>.  
<https://www.kut.org/covid-19/2021-08-04/delta-variant-is-making-up-more-than-75-of-new-covid-19-cases-in-texas-health-officials-say>

(“CDC”) updated its “Guidance for COVID-19 Prevention in K-12 Schools” to recommend “universal indoor masking for all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status,” noting that “protection against exposure remains essential in school settings.”<sup>8</sup> The CDC explained that the “universal mask” recommendation was motivated by “the circulating and highly contagious Delta variant.” Indeed, as reported by the American Academy of Pediatrics, there has been a nearly sevenfold increase in new child COVID-19 infections in the last month, with 12,000 cases reported nationwide in the first week of July and up to 96,000 in the first week of August.<sup>9</sup> As noted by one publication, “child hospitalizations have now reached an all-time pandemic high.”<sup>10</sup>

34. According to reports, medical professionals in part attribute the increase in COVID-19 pediatric infections to the latest variants in the virus and the fact that children under 12 years old are ineligible to receive the vaccines.<sup>6</sup> COVID-19 vaccines have been shown to be effective at helping protect against severe disease and death from variants of the virus currently circulating, including the Delta variant.<sup>11</sup> Unfortunately, accordingly to Dr. Murphey, only 45% of Texans are fully vaccinated. Even more alarming, Dr. Murphey notes that Texas is “among 20 states considered ‘high’ risk for the unvaccinated” given

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<sup>8</sup>. Centers for Disease Control, *Guidance for COVID-19 Prevention in K-12 Schools*, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last updated Aug. 5, 2021).

<sup>9</sup>. Emily Anthes, *The Delta Variant Is Sending More Children to the Hospital. Are They Sicker, Too?*, The N.Y. Times, Aug. 9, 2021, <https://www.nytimes.com/2021/08/09/health/coronaviruschildren-delta.html>.

<sup>10</sup>. Katherine J. Wu, *Delta Is Bad News for Kids*, The Atlantic, Aug. 10, 2021, <https://www.theatlantic.com/health/archive/2021/08/delta-variant-covid-children/619712/>.

<sup>11</sup>. Centers for Disease Control, *Key Things to Know About COVID-19 Vaccines*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (last updated Aug. 16, 2021).



recorded COVID-19 cases and positivity test rates. *Id.* ¶7. Plaintiffs are all under the age of 12 and thus do not qualify for COVID-19 vaccination at this time. To make matters worse, according to Dr. Alexander Yudovich, a board-certified pediatrician, fellow of the American Academy of Pediatrics (“AAP”), member of the medical advisory team of a Houston private school, and former chief resident at Children’s Hospital Los Angeles, both COVID-19 and respiratory syncytial virus (“RSV”) are circulating throughout the country, and if a child contracts both viruses, it can lead to a “higher likelihood of respiratory failure [and] necessity for ICU care.” Dr. Yudovich further states that the combination of the Delta Variant and the unvaccinated status of children under 12 years old will mean, “schools without mitigation strategies will be an epidemiological disaster and a lesson in statistics.” The Doctor’s support the *Swiss Cheese Model* of protection, which simply put has the common sense notion that the more layers of prevention the better. Not surprisingly, Texas is a state included in the CDC’s June 2021 RSV health advisory.<sup>12</sup>

#### E. COVID 19 AND THE DELTA VARIANT LOCALLY

35. As we know the Connally Independent School District in Waco announced five schools would be shut until after the death of two teachers. The Iraan School District delayed opening school for a few weeks. One child from Houston needed to get immediately to the ICU, but there were no beds. All pediatric ICUs in Houston were full so she was airlifted to the closest, 150 miles away in Temple, Texas.. Closer to home the Richardson Independent School District shut down one of its elementary schools because of the virus. Reportedly

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<sup>12</sup>. See *E.T., et al v. Governor Greg Abbott, et al*, C.A. No. 1:21-cv-00717-LY (W.D. TX- Austin Division) “PLAINTIFFS’ EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION and evidence attached thereto.

one child is in intensive care.

36. Collin County reports that about a year ago there were just about 100 people in the county who were hospitalized. There were 107 in July and about 400 at the beginning of August. On September 3<sup>rd</sup> there about 543 people hospitalized.<sup>13</sup> For all practical purposes there are almost no pediatric ICU beds in the greater DFW area. As noted in the opening section over 200 hundred physicians at the Cook's Children Health Care System recently sent an *Open Letter* "To the leadership at North Texas Regional Schools." Importantly it stressed the following ten (10 points):

1. Make sure all children are up to date on the routine childhood vaccinations needed for school entry. Access to medical offices, fear of leaving home and of waiting room exposures, and closed schedules of weary medical providers taking long-awaited vacations could result in a drop in vaccination rates against measles, mumps, rubella, pertussis, and the bacteria causing meningitis. A slight drop in vaccine coverage for measles, pertussis, and mumps translates quickly to a loss of herd immunity and outbreaks of serious, vaccine-preventable illnesses.
2. Revisit the latest masking decisions in light of the recent surge in COVID-19 cases. The American Academy of Pediatrics (AAP) and the Centers for Disease Control and Prevention (CDC) advocate for masking in schools, especially in areas with moderate to high transmission of COVID19. Follow guidance from your local health department, which will be in line with the current state of the pandemic and regional community health recommendations. We have learned during the pandemic that most children, 2 years of age and older, can wear a mask.
3. Encourage COVID-19 vaccination of all eligible children and adults. COVID-19 efficiently spreads from adults and teenagers to younger children, not often the reverse. The key to keeping schools open during the COVID-19 pandemic is getting unimmunized parents and all eligible family members vaccinated.
4. Arrange for mobile COVID-19 vaccination units to be present during orientation and events such as 'meet-the-teacher' nights. Gains in U.S. vaccine acceptance are likely to come amidst the group of people who don't have a solid reason to avoid vaccination. Surveys reveal that most of these people were hoping that the pandemic was wrapping up and that they would not have to take a risk by taking an "untested"

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<sup>13</sup>. <https://experience.arcgis.com/experience/c00baf45f12a4899aae1c812e29d6cde>

vaccine. They are reasonable people who describe themselves as cautious, slow adopters of things that are new. Most are not necessarily opposed to vaccination philosophically. They were just hoping to wait out the pandemic while relying on social distancing, masking, and herd immunity to keep them from having to get a vaccine. With the loosening of restrictions and the surge in cases due to the Delta variant, many are now ready to stop holding out.

5. Continue to utilize strategies promoting social distancing in the classroom (by using partitions, separating desks, and cohorting of student groups), during passing periods (by keeping them short to discourage standing around in small groups and conversing), and during meal times (by moving meals outside in the fresh air, limiting line length for meal service, and by observing social distancing).

6. Re-enforce good hand-hygiene practices and cleaning of shared workstation areas with demonstrations that highlight effective hand hygiene and disinfection techniques.

7. Quarantine unvaccinated children and school staff members exposed to COVID-19 per CDC guidance. Vaccinated exposed persons may still get sick with COVID-19 and could be contagious, though their risk of hospitalization and severe disease is extremely low. Quarantine exposed, vaccinated persons if they develop symptoms of COVID-19 until testing results are available.

8. Provide interactive and technologically sound, distance-learning alternatives for immunocompromised students who should not be in the classroom during the pandemic.

9. Encourage precautions for bus riders like masking and opening windows to promote adequate ventilation and reduce the transmission of COVID-19 while traveling to and from school.

10. Above all, send recurring reminders to parents not to send ill children to daycare and to school. Many parents are returning to the workplace for the first time in over a year. They may be experiencing pressures to be physically present, rather than staying home with an ill child. Memories are short when pressures are high. However, we are still in the midst of a global COVID-19 pandemic that has already claimed the lives of more than 600,000 people in the U.S.”

## **XII. FACTUAL RESUME**

### **A. THE ALLEN INDEPENDENT SCHOOL DISTRICT**

37. Allen Independent School District is a public school district based in Allen, Texas (USA).

Allen ISD covers most of the city of Allen, as well as portions of the cities of McKinney,

Plano, and Parker. The district has a total enrollment of 21,634[5] students. As of the 2016-2017 school year, the appraised valuation of property in the district was \$10,146,542,000. As of 2018-2019 School Year Caucasians make up 46.5% of the District's Catchment area, with 20.9% Asian, 13.8% Hispanic, 13.1% African American and few percentages of American Indian (0.5%), Pacific Islander (0.3%) or mixed (4.9%). It has one high school, a specific science and technology program, a freshman center (9<sup>th</sup> grade), three middle schools and a disciplinary center. It has 18 elementary schools. Anderson, Bolin, Boon, Boyd, Chandler, Cheatham, Evans, Green, Kerr, Lindsey, Marion, Norton, Olson, Preston, Reed, Rountree, Story and Vaughan Elementary.<sup>14</sup>

38. As noted above the Allen Independent School District does not have a mask mandate, relying upon the Governor's Executive Order in support of their position. The District's website has a dashboard that reports active cases and reflects that children in the elementary schools have, but not surprisingly, been disproportionately affected.<sup>15</sup> There is strong anecdotal testimony and evidence that over 70% of all the people in the City of Allen, who recently been reported as COVID positive, are in the Allen ISD schools. There is also strong anecdotal testimony and evidence that the number of children who have tested COVID positive in the Allen ISD since school started, are close to the same number of students who got sick all last year. The trend is worsening. Some District's are responding on their own, the Allen ISD is not.<sup>16</sup>

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<sup>14</sup>. [https://en.wikipedia.org/wiki/Allen\\_Independent\\_School\\_District](https://en.wikipedia.org/wiki/Allen_Independent_School_District)

<sup>15</sup>. <https://www.allenisd.org/Page/59663>

<sup>16</sup>. COVID-19 List of Government Entities Unlawfully Imposing Mask Mandates, Attorney General of Texas, <https://www.texasattorneygeneral.gov/covid-governmental-entity-compliance> (last visited Aug. 17, 2021) (noting that a total 51 governmental entities were reported as not in

B. PLAINTIFFS

39. JOHN DOE I is a sixth (6) grader at the Bolin Elementary School. He has significant anxiety about bringing the Covid Virus home from school. That is because there is no requirement that any student, teacher, parent visitor or a delivery person from a commercial vendor wears a mask. JOHN DOE I also reports that majority of students are also unvaccinated because they are under twelve (12) years old and can't be vaccinated. He also reports that the School is not practicing any kind of social distancing.
40. Even though he can wear a mask he is worried because he is exposed to so many people each day. Specifically, JOE DOE I is in a program where he moves from classroom to classroom for seven periods each day. Each class has a different teacher and each class has different students based upon ability. In addition, JOHN DOE I participates in the AIM Program where students from the 4<sup>th</sup> through 6<sup>th</sup> Grades are clustered together. This same type of clustering of students from different grades occurs in art, orchestra, band, choir and resource classes. Some of the teachers come in from other elementary schools. During lunchtime there are eight (8) students to a table and eight (8) classes, likely over two hundred (200) students and teachers together in a closed place. The District permits parents and even pre-school students to also come to lunch. They also permit parents to bring in food purchased from a third party. Physical Education class is also clustered with up to hundreds of students at the same time. Because of the heat all physical education classes are indoors. Again, no one was required to wear masks. When his parents went to a meet the teacher night, mother reports that less 10% of those in attendance; parents, teachers, children wore masks. None

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compliance with Executive Order GA-38 and were sent letters by the Texas Attorney General's Office).

of his eight (8) plus teachers wore a mask. It is unknown as to how many children have been quarantined, let alone experiencing symptoms of the Delta Variant, even for a short period because the District does not share that information in “real time.” His concerns, and those of his parents are exacerbated because his sister, JANE DOE I has significant health concerns and the District has no protocols to address this issue for him, and other students who have family members with compromised health issues.

41. JANE DOE I is a Senior at Allen High School. She has a number of medical disabilities which hamper her immune and respiratory systems along with her quality of life. Specifically, she has a *Trigeminal Schwannoma*, which is an optic nerve sheath tumor next to her brain stem. It puts pressure on her optic nerve causing changes in the eye and the well being of the eye. It also affects her auditory nerve and reduces her hearing. It also causes facial paralysis and loss of feeling on half of her face to behind her ear. Illness and stress can cause the tumor to shift and cause her great pain that comes from the inside of the eye. She says that it feels like a thousand needles being shoved out of her eye. Jane Doe I also has *Idiopathic Environmental Intolerance* (“IEI”) where she experiences increasing levels of reactions to environmental stimuli. Basically anything outside of her own body can begin to agitate her and will get worse with more exposure. It affects both respiratory and immune responses. It can also impact food and medical allergies. As of right now Jane Doe I has had both of the initial doses of Pfizer Vaccination nevertheless and due to all of the above, she is at risk for catching the Delta Variant.
42. Her parents have met with many of her doctors since the pandemic started, and have been advised that isolation is her best course in regards to her health. With her high risk factors and sensitivity to medications her doctors are also very concerned that any Covid infections

may reduce her quality of life substantially or kill her outright. For example, there is a risk of getting febrile seizures for which she has been hospitalized for in the past. Or that the Covid can strain her body enough that the problems in regards to the tumor may worsen to the point where it is affecting her all the time. Such as long term pain described as the feeling of needles coming out of her eye and more facial paralysis or numbness in her face. Also they are concerned that the tumor may shift closer to her brain stem affecting her quality of life without mechanical assistance for the rest of her life. Her parents have met with the school student services office to seek the provisions to evoke a safe environment but they are limited in what they can do because her brother, JOHN DOE I.

43. JOHN DOE I's parents have asked that he be permitted to receive what is termed *Virtual Services* like what all the students were able to receive last year or what is termed *Home Bound Services* but the request was denied because he wasn't ill, his sister was. In regard to in-School Attendance, the Staff his parents spoke to refused to follow any CDC Guidelines, even outside the mask recommendations. At this time he receives no educational services from the District at all because of their refusal to do so. As of this writing he is being marked absent, is considered truant and is awaiting notice from the local Court on this topic. If charges are lodged the student may be forced to file a formal and costly motion to have their records expunged. .

C. ANECDOTES FROM MEMBERS OF THE PROPOSED CLASS<sup>17</sup>

44. My child came home from school on August 31 and told us the class was quarantined in the classroom. Only 11 kids were present out of approximately 23. They ate lunch in the class

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<sup>17</sup>. The paragraphs in this section almost verbatim. There are many more.

and did not go to recess. They children were also told that on September 1st they would not even leave their classroom at all due to the amount of children who were absent. Parents were never notified about this. We were never given the option to pick up our child in response to the outbreak in his classroom. Parents have still not be notified of the restrictive procedures imposed on our children without our knowledge. Further, the only child in the class without a mask was seated next to my child. I was told that AISD cannot move children based on their masking. I emailed the Principal again and she stated that this decision was made because of the large amount of absences in guidance with the district. It is incomprehensible that a school district finds this acceptable. To not notify parents that their child is in a class that is deemed too dangerous to be mixed with the rest of the school is outrageous. To decide the best course is to incubate all of those kids in one confined area full well knowing that the likelihood of children in that class carrying covid is very high, is malicious. Instituting CDC guidelines at AISD would have prevented this from happening. My child was subjected to a science experiment because AISD refuses to follow universally accepted health practices designed to mitigate the spread of Covid.

45. On August 26<sup>th</sup> my child's brother tested positive for COVID-19. In line with CDC protocols for close contact, my child began a quarantine and tested negative for COVID on an antigen test on the 27<sup>th</sup> and a PCR test on the 29<sup>th</sup>. She was absent from school on Friday the 27<sup>th</sup> due to the quarantine. On September 3<sup>rd</sup> we received notification that her classmate tested positive for COVID. In order to again abide by CDC guidelines for close contact my child began her quarantine and cannot be tested until the 7<sup>th</sup> due to the Labor Day Holiday. If her antigen and PCR test returns negative, the first day she can return to school is the 10<sup>th</sup>. Unfortunately this means she will miss four days of school for a total of 5 days marked



absent in the first month of school. Last year she had two absences the entire virtual school year. Now, because the district has chosen not to provide an alternative plan for COVID or close contact quarantine, she will be almost one third of the way towards her allowed absences before hitting the 90% mark. In another first grade class, at least three children have successively tested positive for COVID. If the same trend takes place in child's class, she will have to quarantine at least twice again and accumulate absences that could be avoided if the District were to require masks or provide a virtual option for those in quarantine. By refusing to protect students from COVID in these simple manners, the District puts parents and students in an impossible situation. Either send a student to school who potentially is carrying COVID and could infect classmates causing an outbreak as has already occurred at Mary Evans and Vaughn Elementary where one class was reduced to 9 students by COVID, or face the risk of not receiving credit for the school year and facing truancy court. The District speaks of the negative effects of learning loss but does nothing to prevent it. Forcing students to contract COVID leads to the same learning loss they foolishly try to prevent by incentivizing students to be in school with potential COVID unmasked.

46. On or about August 23<sup>rd</sup> my son woke up with a fever and congestion. On the 18<sup>th</sup> and 19<sup>th</sup> we did receive notification of a confirmed positive Covid case on my child's elementary school campus, but with no other information. Parents were informed that the class, grade, or any other information would not be revealed to parents even if their children were in close contact to sick child. Another parent at the same school wrote about the same situation- that because the District failed to provide important information I felt that I had no choice but to keep all three of my children home on August 23<sup>rd</sup>.

47. A third parent wrote that I took my symptomatic child to be tested immediately on August 23<sup>rd</sup> at an urgent care so I would know if he had Covid. He tested negative with the rapid test, but the doctor informed us that it may be too early to get a positive result and to still be cautious and retest in a few days if he has symptoms. I then emailed the School Principal, Ms Jackson, and the school nurse, Haley Ranney, to ask if they could give me more information about the positive cases on the 18<sup>th</sup> and 19<sup>th</sup> so I could consult with our pediatrician for the next steps. I received a phone call at the end of the day on the 23<sup>rd</sup> from Nurse Ranney explaining to me that they could not give me any further definitive information about whether or not my son with symptoms, or my other children, were a close contact of the positive cases, or even in the same class or grade. I also didn't know how many positive cases were on campus, as the letters received on the 18<sup>th</sup> and 19<sup>th</sup> did not specify whether there was only one case or many cases. This lack of information made it extremely difficult and distressing to make health care decisions for my children, and to decide whether or not to send my asymptomatic children back to school. If I kept them home, they would accrue unexcused absences and miss out on instruction. If I sent them to school, and they HAD been exposed to Covid, they would have had potentially spread the virus to hundreds of students (between home room, recess, lunch, and my 6th grader switching classes and mixing with different students, it would at least be several hundred in contact with my children). I suffer from anxiety about this situation and the lack of notification of Covid cases put my family at risk and jeopardized my mental health.
48. There was a mass outbreak in son's class (largest outbreak in the District so far with as many as 20 students in the GATE program) —The District did not even acknowledge the outbreak or enable the class and teachers to quarantine. There was a clear cluster as defined under

Collin County Health Services criteria and nothing was done. Parents received notifications at best 24 hours after exposure and sometimes never at all. This lack of following CDC protocols enables the virus to spread throughout students at an exponential pace.

49. My child is a 5th grader at Mary Evans Elementary School in Allen, Texas. On Tuesday, August 24, 2021 several of my child's friends and classmates tested positive for Covid. My child received a rapid test on Wednesday, August 25 and it was negative. The doctor told us that my child could return to school. That day, another child in my child's class tested positive for Covid but we didn't know. My child went back to school on Thursday, August 26 and towards the end of the day felt congested. Immediately, we took my child for another rapid test, this time it was positive. The doctor also performed a PCR test to confirm. The lab report was emailed to the school nurse at 9:17 AM on Friday, August 27. The nurse responded that my child's return date would be September 7. All day Friday passed and a district notification was not sent out to his class as to his positive test. I alerted the principal to this issue on Sunday, August 29 and emailed another copy of the lab report to her. She diligently looked into the matter and could not determine happened. She did inform me that the district sends the notifications out. Monday, August 30 came and went and still there was no notification. The children who were in class with my child on Thursday, had now gone Friday, Saturday, Sunday and Monday without notification of a potential exposure. This is in clear violation of TEA guidelines and created a dangerous environment for AF's classmates.
50. Another wrote. My child's PCR test came back negative on August 28. My child was re-tested and it came back negative again on August 30. The doctor said my child could return to school on August 31. Through friends, my child knew that more children had tested

positive over the weekend and almost half the class was out. The District did not inform us of these new cases either. We were left in a difficult spot as my child as AISD has alerted us that missing more than 10 percent of classes could result in my child not passing their grade and or truancy charges being filed.

51. My son was in direct contact with a student that tested positive for Covid. I was not notified by the school with the exception of the general letter that was provided. The student texted my son stating that he should be tested because they sit together in class and also have lunch together. Upon learning that information I thought it would be best for the safety of others to have my son remain home until he received a negative test result. When I called Allen HS, I was told that I was not required to keep him home if he felt fine. I was not required to have him tested or to quarantine him. The school informed me that they are not trace tracking so they are not planning on informing other students that were close to the positive student. She said we will send out the general letter but we are not really required to do that. We do it as a courtesy since we adhere to the guidance from the state. I was also told that my son's absent days were not going to be excused unless he is positive too. He was out of school for 4 days school days and we are concerned what will happen if he has to quarantine again and again.
52. In my child's 5th grade class a student became Covid positive. We were not notified that there was a person in his class that was positive. Due to the lack of notification, we were not able to quarantine my son in time and he ended up getting sick and tested positive for Covid on the 20<sup>th</sup>. Later my entire family contracted Covid. My son also has asthma and got very sick from Covid and had a fever for 5 days along with body aches and fatigue. The sickest he has ever been. He still has headaches and fatigue from being sick. He needs to rest/ takes

a nap every day and cannot run around like he did before Covid.

53. As a staff member, I need as much anonymity as can be afforded to me. Persons in the Nursing Department are being told we can't recommend safe practices outside of what the District has given guidance for. For example, we can't recommend or encourage mask wearing, putting desks into rows, distancing at lunch, or sending out newsletter communication. I have shared some of these concerns with District Staff and have received no response.
54. Allen ISD makes up approx 70 percent of cases in the entire city of Allen. Elementary kids make up approx 70 percent of cases in AISD. Case counts have exponentially grown since the first week. Last year in total AISD had around 600 cases, AISD has since destroyed the numbers so we can't get a perfect count. This year after 3 weeks, AISD students have had around 600 cases. AISD doesn't offer cumulative count like they did last year so this is best estimate based on parents following numbers each day.
55. Multiple students have been withdrawn from AISD, upwards of over 200 due to the District not following CDC protocols. Our families are now stuck sending their children to private schools who do follow CDC guidelines or home schooling them. This creates a hardship financially, emotionally and especially from a learning perspective. These students would be attending their public schools if proper CDC guidelines were followed.

### **XIII. INJURIES EXPERIENCED BY THE DOE's and the PROPOSED CLASS**

56. The DOE's and members of the PROPOSED CLASS have gotten the Delta Variant.
57. The DOE's and the PROPOSED CLASS are frightened they will get the Delta Variant again.
58. The DOE's and the PROPOSED CLASS are frightened they will communicate the Delta

Variant to a loved one, fellow student, teacher or neighbor.

59. The DOE's and the PROPOSED CLASS are frightened because they do not know what the long term effects of the Delta Variant.
60. The DOE's and the PROPOSED CLASS are upset because if their parents keep them home from school during this time of uncertainty they will miss valuable educational time.
61. The DOE's and the PROPOSED CLASS are frightened because if their parents keep them home from school during this time of uncertainty they will be marked absent from school, be declared truant and have to go to Court.
62. The DOE's and the PROPOSED CLASS are frightened because if their parents keep them home from school during this time of uncertainty they will be discharged from specialty classes and programs.
63. The DOE's and the PROPOSED CLASS are frightened because when they wear masks at school and others do not, they are treated as objects of derision by other members of the school community because of the District's punitive responses noted above.
64. This list is merely illustrative and not a complete list of all damages experienced.

#### **XIV. CLASS REQUIREMENTS**

65. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth. In addition, each sentence and paragraph below, likewise incorporates by reference as if fully set forth herein, the one above it.
66. Pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(1), 23(b)(2), and 23(b)(3), the DOE's, named Plaintiffs herein, bring forth this class action on behalf of themselves and the members of the PROPOSED CLASS.
67. The exact number of the PROPOSED CLASS is not presently known, but the PROPOSED

CLASS consists of all children who are in an elementary school at the Allen Independent School District and have a sibling at a middle school, highschool or other campus within the Allen Independent School District family.

68. Plaintiffs reasonably believe the PROPOSED CLASS is believed to consist of approximately 7,000 students in the elementary schools, with a like number in the high school, and more or less- a like number in the middle schools, freshman campus and specialty schools and joinder of all of such members in this lawsuit is impracticable.
69. There are common questions of law and fact in the action that relate to and affect the rights of each member of the PROPOSED CLASS that will generate common answers that will drive resolution of this action. Further, the relief sought is common to the DOE's and the entire PROPOSED CLASS as all are victims of the School Board's Defendants' unconstitutional conduct. Accordingly, pursuant to Federal Rules of Civil Procedure 23(a)(2), there are questions of law and fact common to the DOE's and the PROPOSED CLASS.
70. The DOE's, named Plaintiffs herein, have claims are typical of the Class they represent pursuant to Federal Rules of Civil Procedure 23(a)(3) because the School Board Defendants violated their rights pursuant to the Due Process Clause of the 14<sup>th</sup> Amendment to the United States Constitution. There is no conflict between the DOE's and any other PROPOSED CLASS members with respect to this action.
71. The DOE's, named Plaintiffs herein, have claims are typical of the Class they represent pursuant to Federal Rules of Civil Procedure 23(a)(3) because the School Board Defendants violated their rights pursuant to the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States Constitution. There is no conflict between the DOE's and any other

PROPOSED CLASS members with respect to this action.

72. The DOE's, named Plaintiffs herein are adequate representatives of the PROPOSED CLASS pursuant to Federal Rules of Civil Procedure 23(a)(4). The interests of the DOE'S do not conflict with the interests of the PROPOSED CLASS that they seek to represent, and the DOE's will fairly and adequately represent the PROPOSED CLASS. Moreover, they intend to prosecute this action vigorously. Therefore, the DOE's, named Plaintiffs herein, should be appointed as representatives of the PROPOSED CLASS.
73. This action is properly maintainable as a class action pursuant to Federal Rules of Civil Procedures 23(b)(a)(A) or 23(b)(1)(B) because the prosecution of separate actions by individual members of the PROPOSED CLASS would create a risk of inconsistent or varying adjudications with respect to individual members of the PROPOSED CLASS that, as a practical matter, would be dispositive of the interests of other PROPOSED CLASS members not party to the adjudication, or would substantially impair or impede the ability of other PROPOSED CLASS members to protect their interests, or would establish incompatible standards of conduct and results for Defendants.
74. This action is properly maintainable as a class action under Federal Rules of Civil Procedure 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the PROPOSED CLASS, thereby making appropriate final injunctive relief and/or corresponding declaratory relief with respect to the PROPOSED CLASS as a whole.
75. This action is properly maintainable as a class action under Federal Rules of Civil Procedure 23(b)(3) because questions of law and fact common to the PROPOSED CLASS predominate over individual questions for the members of the PROPOSED CLASS, and a class action is superior to other available methods for the fair and efficient adjudication of this case.



76. There are numerous questions of law and fact common to the PROPOSED CLASS including, though not limited to, the following:
- a. Whether the Allen Independent School Board receives federal funds;
  - b. Whether the Allen Independent School Board is required to follow the United States Constitution;
  - c. Whether the Allen Independent School Board is a subdivision of the State of Texas;
  - d. Whether the members of the PROPOSED CLASS receive educational services from the Allen Independent School District;
  - e. Whether the members of the PROPOSED CLASS are unable to represent themselves;
  - f. Whether the Allen Independent School Board has failed to follow the requisites of the 14<sup>th</sup> Amendment to the United States Constitution;
  - g. Whether members of the PROPOSED CLASS have been excluded from participation in or being denied the benefits of the services, programs, or activities otherwise provided by the School Board of the Allen Independent School District.
77. The DOE'S, named Plaintiffs herein have retained counsel for themselves and the PROPOSED CLASS that are experienced and capable in their field and have been recognized as knowledgeable, capable counsel who have carried out their duties.

#### **XV. STATE ACTION**

78. At all relevant and material times the School District Defendant was acting in its capacity as a duly organized executive agency pursuant to the Constitution of Texas, and the statutes and regulations promulgated by the State of Texas. As such, it is subdivision of government and has a duty to follow the requisites of the United States Constitution at all relevant and

material times. In light of all the above, the School District Defendant was acting under the color of law when the acts and/or omissions alleged occurred.

#### **XVI. VIOLATIONS OF THE UNITED STATES CONSTITUTION**

##### **A. DUE PROCESS**

79. During the relevant time period contemplated by this cause of action, the Allen Independent School District by and through its School Board Members have an actual practice and custom of conscious and deliberate indifference to the right to life of the DOE's and members of the PROPOSED CLASS, underscored in the Due Process Clause of the 14<sup>th</sup> Amendment to the United States, and such deliberate indifference to the constitutional rights of Plaintiffs, were and continue to be a moving force in the injuries stated herein, to which the Plaintiffs and each member of the PROPOSED CLASS for which all seek equitable relief pursuant to 42 U.S.C. §1983.

##### **B. EQUAL PROTECTION**

80. In addition and in the alternative to the above, during the relevant time period contemplated by this cause of action, the Allen Independent School District by and through its School Board Members have an actual practice and custom of conscious and deliberate indifference to the right to life of the DOE's and the members of the PROPOSED CLASS, underscored in the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States, and such deliberate indifference to the constitutional rights of Plaintiffs, were and continue to be a moving force in the injuries stated herein, to which the Plaintiffs and each member of the PROPOSED CLASS for which all seek equitable relief pursuant to 42 U.S.C. §1983.

#### **XVII. REQUEST FOR RELIEF**

81. Without the intervention of this Court, the DOE's and the PROPOSED CLASS, Plaintiffs

herein cannot prevent the School Board Defendants from continuing their violations of the due process clause of the 14<sup>th</sup> Amendment to the United States Constitution, relative to life and health of students, faculty, family and other members of the school community. In “plain English” until vaccines are made available to children under twelve (12) years old Plaintiffs and members of the PROPOSED CLASS face an imminent threat of harmful and potentially life-altering and life-threatening consequences if exposed to an environment bereft of universal masking required at the Allen Independent School District. Though parents of all children have cause for concern, those with children who have disabilities that compromise immune responses or impair respiratory or neurological function have heightened reasons to be anxious about returning to school without a mask mandate in place. According to the CDC, “children with medical complexity, with genetic, neurologic, metabolic conditions, or with congenital heart disease can be at increased risk for severe illness from COVID-19.”<sup>18</sup>

82. Without the intervention of this Court, the DOE’s and the PROPOSED CLASS, Plaintiffs herein cannot prevent the School Board Defendants from continuing their violations of the equal protection of the law of the 14<sup>th</sup> Amendment to the United States Constitution, relative to life and health of students, faculty, family and other members of the school community. Accordingly, the DOE’s and the PROPOSED CLASS, Plaintiffs herein respectfully pray that the Court enter an order granting the following relief:
83. An order directing the School Board Defendants of the Allen Independent School District to immediately follow the standards and practices for the health care of students in public

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<sup>18</sup>. Centers for Disease Control, *COVID-19: People with Certain Medical Conditions*, May 13, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medicalconditions.html>

school as provided by the United States Department of Health and Human Services, Center for Disease Control, and as updated and alternatively directives, from the Cook Children's Health System.

84. An order requiring the Defendant to send out a message to all persons and families in the School District catchment area notice of this lawsuit including and especially the importance of the anti-retaliation requisites of Board Policy and the First Amendment to the United States Constitution.
85. An order requiring the Defendant to send out a message to all persons and families in the School District catchment area notice of and the Court's mandate.
86. DOE's and the PROPOSED CLASS, Plaintiffs herein also pray that the Court issue a permanent injunction against the Defendants.
87. DOE's and the PROPOSED CLASS, Plaintiffs herein request that the court appoint a Special Master to ensure that required changes are reviewed, approved, and implemented.
88. DOE's and the PROPOSED CLASS, Plaintiffs herein request that the court appoint a Federal Judge Magistrate to offer alternative dispute resolution services in lieu of costly, time-consuming and vexatious litigation.

#### **XVIII. DEMAND FOR A JURY TRIAL**

89. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a jury trial for all issues in this matter.

#### **PRAYER**

**WHEREFORE, PREMISES CONSIDERED,** DOE's and the PROPOSED CLASS, Plaintiffs herein, pray in the manner and particulars noted above, including and especially as to the equitable relief requested; of attorney's fees and costs for the preparation and trial of this cause of

action, and for its appeal if required, together with pre- and post-judgment interest for same, and for such other relief as this Court may deem just and proper, whether at law or at equity or as to both.

Respectfully submitted,

/s/ Martin J. Cirkiel

Mr. Martin J. Cirkiel, Esq.

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**CERTIFICATE OF SERVICE- COURTESY COPY**

The undersigned hereby certifies that on this the 8<sup>th</sup> day of September, 2021, this Counsel has been in contact with the below-referenced counsel, who have agreed to accept/waive service in this cause for Defendants. Further, that a true and correct copy of the foregoing has been sent to Counsel by electronic transfer (email) and thereafter by the Court's electronic filing system.

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ATTORNEYS FOR DEFENDANT ALLEN INDEPENDENT SCHOOL DISTRICT  
AND MEMBERS OF THE SCHOOL BOARD OF DIRECTORS

/s/ Martin J. Cirkiel

Martin J. Cirkiel

**STATEMENT OF CERTIFICATION BY COUNSEL OF RECORD**

The undersigned hereby certifies pursuant to Local Rule CV-5(7) that:

- (A) all sealed documents state “FILED UNDER SEAL” at the top;
- (B) a *Motion To Seal* the above-noted document has been filed;
- (C) the *Motion To Seal* the above-noted documents has been filed prior to the filing of this *Original Complaint*; and

A true and correct copy of the foregoing has been forwarded to the following counsel, as a personal and professional courtesy on this the 8<sup>th</sup> day of September, 2021 by electronic transfer (email).

Mr. Lucas Henry, Attorney

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AND MEMBERS OF THE SCHOOL BOARD OF DIRECTORS

/s/ Martin J. Cirkiel

Martin J. Cirkiel